No. 80-148

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

JEFFREY RICHARD ROBBINS,
Petitioner,

VS.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did petitioner have an expectation of privacy in the packages in his car so intense that police were constitutionally required to secure a warrant before examining them?

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OPINION BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Four, filed on March 4, 1980, is appended to the Petition for Writ of Certiorari and may be found at 103 Cal.App.3d 34, 162 Cal.Rptr. 780.[1/]

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1. The Court of Appeal filed two earlier opinions, both unpublished, in this case. The first, filed on June 30, 1976, was vacated by that court's order of July 22, 1977. Petitioner's appeal was reinstated for further briefing and oral argument. Prior to its vacation, petitioner had sought review of this first opinion by

JURISDICTION

Petitioner would invoke this Court's appellate jurisdiction under Title 28, United States Court sections 1257 and 2101. Jurisdiction is conferred by Title 28, United States Code, section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments Four and Fourteen, section 1.

STATEMENT OF THE CASE

The District Attorney of Solano County accused petitioner Jeffrey Robbins of possession, possession for sale, and transportation of marijuana and of driving under the influence of a drug, by an information filed on January 23, 1975 (CT

Footnote 1: (Continued)

petition for writ of certiorari filed in the United States Supreme Court on December 14, 1976 (No. 76-817). Following a response by the State of California, this Court denied the petition.

After reinstatement of the appeal, the Court of Appeal filed a second opinion on

8-9).[2/] Petitioner pleaded not guilty (CT 11), was tried by a jury (CT 13), and convicted of possession, possession for sale, and transportation of marijuana, but acquitted on the remaining charge (CT 48).

Proceeding eastbound on Interstate Route 80 at 1:45 a.m. on January 5, 1975, California Highway Patrol Officer DePue noticed petitioner driving in the same direction along parallel Nelson Road (RTS 4-5).

Footnote 1: (Continued)

May 9, 1978, and amended it on May 22, 1978. After denial of a hearing by the California Supreme Court on July 5, 1978, petitioner sought review in this Court by petition for writ of certiorari filed on October 3, 1978 (No. 78-567). On June 25, 1979, this Court granted the writ, vacated the decision of the Court of Appeal, and remanded the cause for further consideration in light of Arkansas v. Sanders, 442 U.S. 753 (1979). 443 U.S. 903.

2. "CT" refers to the Clerk's Transcript on Appeal; "RTS" refers to the Reporter's Transcript of the Suppression Hearing; "RT" refers to the Reporter's Transcript of trial proceedings; "PHT" refers to the Transcript of the Preliminary Hearing.

As DePue observed petitioner at a distance of about one tenth of a mile (RTS 5), Robbins twice crossed the center line of the roadway (RTS 6). Approaching a curve, petitioner's automobile drifted into the oncoming lane the full width of the vehicle, its right wheels reaching the center line (RTS 6). Robbins returned his auto to the right side of the road but while negotiating the curve drifted three feet across the center line (RTS 6-7). DePue also noted that petitioner was driving 30 miles per hour in what DePue thought was a 55 miles per hour zone (RTS 6). Judging petitioner's driving to be erratic, DePue and Sergeant Stoltz followed and stopped him "to determine why it had left--was operating outside of a marked road lane." (RTS 7).

Petitioner immediately alighted, meeting DePue midway between their vehicles (RTS 8). The officer asked for Robbins' operator's license and ownership registration

(RTS 9).[3/] Petitioner, perspiring profusely, swallowing rapidly, his eyes bloodshot and watery, experienced difficulty in removing the license from his wallet (RT 39-40). When Robbins opened his car door to retrieve his registration, DePue, standing three to four feet behind him, smelled the familiar odor of burned marijuana within the vehicle (RTS 9-10; RT 40-42). The officer also noted smoke in the car's interior (RT 43).

DePue then pat searched Robbins for weapons (RT 42; RTS 10), finding only a vial of malodorous liquid (RTS 11, RT 43). DePue next entered the passenger compartment to recover a pair of tweezers observed

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3. California Vehicle Code section 4454 requires owners to maintain the registration or a facsimile copy in their vehicle. Vehicle Code section 2804 authorizes California Highway Patrol officers, "upon reasonable belief that any vehicle is being operated in violation of any provisions of this code" to "require the driver of the vehicle to stop and submit to an inspection of the . . . registration card." Vehicle Code section 12951 obliges a driver to carry his license while driving and to present it upon demand of a peace officer enforcing traffice regulations.

on the front seat (RT 43, RTS 12). The patrolman previously had observed such devices used to hold marijuana roaches (RT 43). After Robbins vomited (RT 44; RTS 12), DePue reentered petitioner's auto and found two pairs of tweezers on the dashboard, one with a burned hand rolled cigarette butt, and a cookie tin on the rear floor (RT 44-45, 47). Inside the tin were two packs of cigarette papers and a plastic baggie containing marijuana (RT 48, 145).

While Officer DePue searched the passenger compartment, petitioner remarked to Sergeant Stoltz, "What you are looking for is in the back" (RT 120). Stoltz repeated this to DePue. Robbins was placed in the patrol vehicle while DePue unlocked the back of Robbins' station wagon, raised the floorboard and removed two marijuana bricks and a tote bag containing some 30 pounds of marijuana (RT 50-53, 140). Inspector Grundy of the Solano County Drug Abuse Bureau placed the street value of

the seized contraband at approximately $8,000.00 (RT 190), a quantity sufficient to supply an individual user for 17 years (RT 189).

About ten minutes after the contraband was discovered, Robbins was advised of his Miranda rights (RTS 21; RT 58). He was not interrogated by the arresting officers (RT 58). Prior to the admonition petitioner told DePue he did not wish "to take a fall for this," (RT 58), and asked Stoltz what it would take "to get out of this?" The sergeant replied that disposition would follow booking. Robbins said, "In my left pocket, check it." Petitioner's left pocket contained $521.00 (RT 122).

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ARGUMENT

THE WARRANTLESS SEARCH OF PETITIONER'S PLASTIC PACKAGES FOUND IN THE TRUNK OF HIS CAR WAS REASONABLE.

Petitioner contends that the warrantless search of the green wrapped plastic blocks found in the trunk of his car violated the Fourth Amendment, as construed in Arkansas v. Sanders, 442 U.S. 753 (1979). In Sanders, this Court held "that the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other situations." Id. at 766. For the reasons which follow, respondent submits that the petitioner's reasonable expectation of privacy in the plastic bags could not be so intense as to require the police to secure a warrant. Accordingly, it was reasonable for the officers to have searched the plastic-wrapped parcels[5/]

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5. Police also searched and found marijuana in a cookie tin located in the passenger compartment and a tote bag situated in the trunk. The marijuana found in these receptacles was suppressed. 103 Cal. App.3d at 41; 162 Cal.Rptr. at 783-784.

based upon the probable cause to believe that they contained contraband.

In Sanders this Court expressly noted:

> "Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant. See Harris v. United States, 390 U.S. 234, 236 (1968) (per curiam). There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile." Id. at 764-765 n.13.

The dispositive question in this case, then, is whether petitioner had a reasonable expectation of privacy in the plastic bags,

which expectation required the obtaining of a search warrant.

Katz v. United States, 389 U.S. 347 (1967), established that the Fourth Amendment conferred upon persons expectations of privacy against police invasion into certain areas. Id. at 353. The late Justice Harlan perceived search questions to be governed by "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" Id. at 361 (Harlan, J., concurring); accord, Rakas v. Illinois, 439 U.S. 128, 143-144 n.12 (1978). Although there has never been an express finding, we assume that petitioner had a subjective expectation of privacy in the plastic bags. Resolution of this case turns upon whether society is prepared to recognize that expectation as "legitimate" or "reasonable." "The focus

in all such cases is on the party's reasonable expectation of privacy in a particular item, a concept which has been elaborated on in the case law." United States v. Gooch, 603 F.2d 122, 126-127 (10th Cir. 1979); accord, United States v. Mackey, 626 F.2d 684, 687 (9th Cir. 1980). This inquiry, of course, is legal rather than factual. United States v. Mackey, supra.

There are two related reasons why petitioner's expectation of privacy in the plastic bags did not require the obtaining of a warrant. First, a green plastic bag (probably designed and sold for the transportation of garbage) is normally not intended "to serve as a repository for personal items. . . ." Arkansas v. Sanders, supra, at 664. As the Mackey court said of a paper bag, it "is among the least private of containers. It is easily torn, it cannot be latched, and, to a greater extent than most containers, its contents can frequently be discerned

merely by holding or feeling the container." 626 F.2d at 687; accord, United States v. Jimenez, 626 F.2d 39, 40-41 (7th Cir. 1980); United States v. Gooch, supra, 603 F.2d at 126-127 (plastic sacks); United States v. Neumann, 585 F.2d 355 (8th Cir. 1978) (cardboard box); United States v. Gaultney, 581 F.2d 1137, 1144-1145 (5th Cir. 1978); People v. Diaz, 101 Cal.App.3d 440, 447-448, 161 Cal.Rptr. 645 (1980) (plastic cup).

United States v. Dien, 609 F.2d 1038 (2d Cir. 1979), is factually inapposite, involving a taped cardboard box, and legally incorrect. The court found that the defendant had a subjective expectation of privacy in the box, but totally failed to analyze whether that expectation was reasonable.

Second, this Court recognized in Sanders that the contents of a container may be inferred from its outside appearance. 442 U.S. at 764-765 n.13. This Court recognized earlier that the shape, design, and weight of a package may provide a definite

clue about its contents. Henry v. United States, 361 U.S. 98, 104 (1959). Relying upon the testimony of the arresting officer (PHT 24), the California Court of Appeal concluded that the "bulky tape-secured packages do not present an appearance of containing anything other than contraband." 103 Cal.App.3d at 40, 162 Cal.Rptr. at 783. For this additional reason, then, petitioner could not reasonably expect police to secure a warrant before searching a package which plainly appeared to contain contraband.

Petitioner's essential position lies in his exhortation to this Court "to hold that there is a reasonable expectation of privacy as to all private property seized in an automobile unless the property falls within the 'plain view' exception of the Warrant Clause." Pet. for Cert. at 19. Petitioner's argument ignores human experience that certain containers are intended to house one's papers and effects while others are not. This rejection of

experience is, in effect, a repudiation of the second inquiry created in Katz and reiterated in Rakas. Were petitioner to prevail, it would mean that each citizen could decide what expectations of privacy are reasonable without regard to society's norms. Having to rely upon the subjective expectations of the arrestees, often drunk or under the influence of narcotics, police would have no identifiable criteria on which to base their decision whether to seek a warrant. Respondent submits that the Katz formulation should not be disturbed and that, under that test, petitioner had no reason to expect police to obtain a warrant before searching his plastic bags.

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CONCLUSION

For the foregoing reasons, respondent respectfully submits that the petition for writ of certiorari should be denied.

DATED: October 27, 1980

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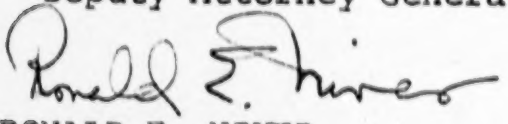

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